

Challenges to the South African corporate leniency policy and cartel enforcement

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1 Introduction

This contribution will address leniency policies in competition law as a tool to detect, prosecute and deter cartel activity, with the focus on challenges to the corporate leniency policy of the South African competition commission.

Certain anti-competitive practices in the South African consumer market are regulated by the Competition Act,¹ which came into effect on 1 September 1999. The purposes of the act are contained in section 2 thereof and includes *inter alia* to provide consumers with competitive prices and product choices.² In brief, the Competition Act regulates horizontal³ and vertical⁴ restrictive practices, abuse of dominance⁵ and price discrimination⁶ as well as mergers and acquisitions.⁷

Section 4(1)(b) of the Competition Act is particularly relevant to this discussion as it contains *per se*⁸ prohibitions aimed at preventing cartel activity such as price fixing, division of markets and collusive tendering.⁹ The orchestrated activities of cartels allow the cartel to act like a monopolist and impede effective competition in the specific market in which the cartel activity occurs which results in prejudice

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¹ 89 of 1998 (hereinafter also referred to as the act).

² s 2(b) of the Competition Act. The Competition Act also has broad public interest objectives relating to aspects such as promotion of employment, extending opportunities for South African firms to participate in world markets, ensuring that small and medium-sized enterprises have equitable opportunity to participate in the economy and promoting a greater spread of ownership to historically disadvantaged persons (s 2(c) to (e)). See also *Competition Commission of South Africa v Senwes Limited* 2012 7 BCLR 667 (CC).

³ s 4 of the Competition Act.

⁴ s 5 of the Competition Act.

⁵ s 8 of the Competition Act.

⁶ s 9 of the Competition Act.

⁷ s 12 of the Competition Act.

⁸ Neuhoff, Govender, Versfeld and Dingley *A Guide to the Competition Act* (2006) 12 explain that a *per se* prohibition is a prohibition which is outright illegal. Once the prohibited conduct is found to have occurred, there can be no justification for it.

⁹ S 4(1)(b) prohibits agreements between, or concerted practices by firms, or a decision by an association of firms that are in a horizontal relationship (thus competitors) if it has or involves directly or indirectly fixing a purchase or selling price or any other trading condition; dividing markets by allocating customers, suppliers, territories or specific types of goods or services; or collusive tendering. In terms of s 4(2)(a) and (b) an agreement to engage in a restrictive horizontal practice as contemplated in s 4(1)(b) is presumed to exist between two or more firms if any one of those firms owns a significant interest in the other, or they all have at least one director or substantial shareholder in common and any combination of those firms engage in that restrictive horizontal practice.

for consumers insofar as prices and choice of products are concerned.¹⁰ Not only does such activity affect consumer welfare,¹¹ but it also hinders development and innovation in the industries within which this activity occurs.¹²

The hallmark of cartels is that they are collusive, deceptive and secretive, and are conducted through a conspiracy among a group of firms.¹³ The result of this secretive collusion is that it is notoriously difficult to detect or prove the existence of a cartel without the assistance of a member who is part of it.¹⁴ Scormagdalia remarks that irrespective of their clandestine character, the existence of cartels is difficult to prove due to their varying and mutating characteristics.¹⁵ Cartels can be evidentially complex in the sense that the duration and intensity of participation and the subsequent anti-competitive conduct on the market of each individual undertaking may vary and take different forms.¹⁶ He points out that these specifics impose a near-unbearable task on competition authorities to prove in detail the cartel infringement and to impose an appropriate sanction reflecting the cartelists' real participation.¹⁷ Cartels are thus viewed by competition authorities in a very serious light and are assigned priority in competition law enforcement, as is evident from the following statement:

“In the course of the so-called ‘war on cartels’, waged on both sides of the Atlantic, cartels have been attributed demeaning epithets such as the ‘ultimate evil of antitrust’, the ‘most egregious violation of competition law’ or the ‘scourges of competition’ – a ‘most damaging form of anti-competitive practice’ calling for a ‘zero tolerance policy’ to ‘stop money being stolen from customers’ pockets’.”¹⁸

In South Africa cartel enforcement is also a priority of the competition authorities, and a firm participating in a cartel can be subject to an administrative penalty of up to 10% of that firm's turnover in the Republic and its exports from the Republic

¹⁰ Monti “Fighting cartels: why and how?” Speech at the 3rd Nordic Competition Policy Conference, Stockholm, 11-12 Sep 2000 at 1 has gone as far as comparing cartels to economic cancer. See also Fletcher “The lure of leniency: maximising cartel deterrence in light of *La Roche v Empagran* and the Antitrust Criminal Penalty Enhancement and Reform Act of 2004” XV *Transnational Law and Contemporary Problems* (2005) 341. Regenspurg explains the anti-competitive effect of cartels as follows: “The decrease in market competition due to cartel activities results in a reduction of social welfare. By setting the price above its competitive level, the cartel members increase their own profits at the expense of the consumers. One can say that cartels exert market power just like monopolistic firms. But not only do cartels exert market power by increasing the price level, they may also produce inefficiencies in product allocation. Cartel members may decrease their output level in order to increase the price market level” (“The effectiveness of corporate leniency programs” (2012 unpublished research proposal for Bachelor research) 6).

¹¹ Fletcher (n 10) remarks that the productive inefficiency of cartel members has the result that the loss of wealth for consumers exceeds the gain in wealth for producers. This reduction in wealth is known as the “dead weight loss to society” (341).

¹² Fletcher (n 10) 341.

¹³ Sutherland and Kemp *Competition Law in South Africa* (15th service issue) 5-80.

¹⁴ Sutherland and Kemp (n 13) 5-80 point out that amnesty and whistle-blowing programmes are essential to the detection and prosecution of cartel behaviour, as they “may provide information about collusion in the smoke-filled rooms where collusion is achieved”.

¹⁵ Scormagdalia “Cartel proof, imputation and sanctioning in European competition law: reconciling effective enforcement and adequate protection of procedural guarantees” 2010 *Competition Law Review* 7.

¹⁶ Scormagdalia (n 15) 8.

¹⁷ Scormagdalia (n 15) 8.

¹⁸ Scormagdalia (n 15) 5.

in the preceding financial year.¹⁹ It is also possible for victims of cartel activity to institute follow-on civil claims for damages.²⁰

The discussion that follows will focus on the rationale behind leniency policies and will lay out the features of the South African corporate leniency policy in detail to show that this policy is in line with international developments on leniency policies. It will further address the challenges to the South African corporate leniency policy by recent court actions instituted to question the validity of the policy, as well as legislative attempts to criminalise cartel conduct.

2 *Leniency policy as the panacea for cartel activity*

2.1 Introduction

Due to the secretive and collusive nature of cartels, the mechanisms afforded by formal competition laws alone are not sufficient to combat them.²¹ Competition authorities in various developed competition jurisdictions have therefore sought to address the problem of detection and prosecution of cartels by introducing “leniency programmes” which operate in tandem with other sanctions such as administrative fines and in some instances civil and criminal prosecution. In essence these leniency programmes seek to detect and prevent cartel operation by providing leniency to firms that disclose the existence of cartel activity in a specific market or markets and that co-operate in the prosecution of other firms involved in such cartel activity.²² Such leniency may take the form of absolution from, and/or reduction of, fines and in some instances an opportunity to firms who do not qualify for amnesty to “plea bargain” for lesser fines.²³ Zingales explains the purpose of leniency programmes as follows:

“A cartel can be described as an organization of businesses that is usually hard to detect, but at the same time maintainable in the long run, provided that some strong psychological assumptions exist among cartel members about their reciprocal behaviour. Consequently the Leniency programme tries to challenge the strength of these assumptions by pushing for a change in cartel members

¹⁹ s 59 of the Competition Act 89 of 1998. See further *Southern Pipeline Contractors v Competition Commission* (105/CAC/Dec10, 106/CAC/Dec10) [2011] ZACAC 6 (1-08-2011).

²⁰ s 65 of the Competition Act 89 of 1998.

²¹ Zingales “European and American leniency programmes: two models towards convergence?” 2008 *Competition Law Review* 5 7. Zingales indicates that because cartels are continuous wrongdoings that involve prohibited behaviour repeated over time it implies that society will be better off with the operation of a leniency programme, since it will get additional benefit for each collusion activity it manages to avoid. See also Leslie “Antitrust amnesty, game theory and cartel stability” 2006 *Journal of Corporation Law* 453; Werden, Hammond and Barnett “Detection and deterrence of cartels: using all the tools and sanctions” paper presented at 26th Annual National Institute on White Collar Crime, Miami, Florida, 2 March 2012.

²² Zingales (n 21) 6. Motta and Polo “Leniency Programs and Cartel Prosecution” 2003 *International Journal of Industrial Organization* 347. The concept of “Amnesty Plus” applies in some jurisdictions such as the US and refers to the situation where an applicant for amnesty can obtain leniency for disclosure of cartel activity that occurs in another market or that is of a different nature than the cartel activity that is being self-reported. A discussion thereof is beyond the scope of this contribution.

²³ The International Competition Network (ICN) *Anti-cartel Enforcement Manual* (2009) ch 2 at 2 (<http://www.internationalcompetitionnetwork.org/capetown2006/FINALFormattedChapter2-modres.pdf> (12-02-2014)) indicates that “leniency” is a generic term to describe a system of partial or total exoneration from the penalties that would otherwise be applicable to a cartel member which reports its cartel membership to a competition enforcement agency.

sentiments: its aim is the destabilization of the organization, and ultimately its detection through confession.”²⁴

Competition leniency programmes are based on the concept of “game theory”, which makes use of an abstract model in order to study how rational people make strategic decisions.²⁵ In terms of this theory there are three main variables that affect a firm’s decision whether or not to join a collusive agreement:²⁶ in the first instance, there is the probability of discovery and prosecution of collusive behaviour; second, the level of punishment; and, finally, the expected future gains for a firm when it is part of a cartel. If the expected punishment exceeds the expected gains from joining the cartel, a rational firm will not become a member of the cartel.²⁷ The strategy of a leniency programme is quite straightforward as follows: by giving cartel members a reward for confessing, the programme disseminates distrust within the cartel.²⁸

By facilitating self-reporting by cartel members leniency programmes are key tools to shorten the time necessary for authorities to get the relevant information.²⁹ They also yield the following further advantages:

“First, the leniency programme directly increases the expected probability with which sanctions will be applied. Second, the leniency program has a destabilizing effect on potential cartels because the first participant for leniency can escape sanctions which are imposed on other cartel participants. Third, the leniency programme facilitates prosecutions because leniency applicants provide access to evidence that might otherwise be unavailable ... Fourth, the leniency programme induces cooperating companies to provide useful information on the existence of other cartels.”³⁰

The concept of a leniency programme in competition law was first introduced by the competition authorities in the United States in 1978.³¹ This programme, which is available to a cartel member who is “first to the door” to self-report on cartel activity (provided that it was not the instigator of the cartel), did however not initially offer automatic immunity, afforded the authorities considerable prosecutorial discretion and also did not offer amnesty if the competition authorities had already begun with

²⁴ Zingales (n 21) 8.

²⁵ Leslie (n 21) 515.

²⁶ Fletcher (n 10) 344; Regensburg (n 10) 9.

²⁷ Regensburg (n 10) 9.

²⁸ Zingales (n 21) 9; Leslie (n 21) 462. Leslie (520) uses the model of the “prisoner’s dilemma” to illustrate why a leniency program can create distrust amongst cartel members. This model starts from the premise that two individuals have committed two crimes, one major, one minor. The prosecuting authority has sufficient evidence to convict both prisoners on the minor charge, which entails only a minimal amount of jail time, for example one year. However, if the uncooperative prisoner is convicted of the major crime he will be sentenced to ten years in jail. Unfortunately, the authorities will not have sufficient evidence of the major crime unless at least one of the prisoners confesses. Knowing this, the authorities can manipulate both the format of the interrogations and the incentives of the prisoners in an effort to convince both prisoners to confess. Fletcher (n 10) 349 explains that the assumption is that both prisoners act rationally to maximise their own utility. The prisoners can optimise total utility (utility of prisoner A plus utility of prisoner B) if they both choose not to confess (cartel members maximise utility by making cartel-level profits while not facing criminal or civil fines). However, since both prisoners are acting rationally according to their own self-interest, they will both choose to confess because they both receive the highest individual pay-off should they confess and the other prisoner does not confess.

²⁹ Zingales (n 21) 6.

³⁰ Werden *et al* (n 21) 5.

³¹ Werden *et al* (n 21) 14; Kobayashi “Antitrust, agency and amnesty: an economic analysis of the criminal enforcement of the antitrust laws against corporations” 2001 *George Washington Law Review* 715; Moodaliyar “Are cartels skating on thin ice? An insight into the South African corporate leniency policy” 2008 *SALJ* 157 162.

the cartel investigation.³² The 1978 programme proved to be unsuccessful,³³ with the result that a revised version of the American Leniency Policy was introduced in 1993 which provides for automatic leniency, allows for amnesty even after an investigation into cartel activity has begun and provides amnesty to both firms and individuals.³⁴ The European Union eventually followed suit by introducing its leniency policy in 1996.³⁵ The European Union initially struck a balance by not granting automatic immunity, preferring to confer only a “reduction” of fines of at most 75% on the firm that first handed over decisive evidence of the cartel existence and lowering this percentage to between 50 and 75% if the cartel investigation had already started.³⁶ Another drawback of the 1996 EU Leniency Policy was that it was heavily reliant on the applicant’s ability to provide “decisive evidence”, and the European Commission did not have the power to make a final offer of amnesty because the European court of justice had to ultimately decide on the granting of amnesty.³⁷ The EU Leniency Policy was revised in 2002³⁸ with a key innovation of introducing the concept of automatic immunity to the first applicant, irrespective of whether or not the investigation had already commenced.³⁹ Such first applicant who provided suitable evidence received full immunity from fines whether or not it had instigated the cartel (although not if it had coerced other firms to join).⁴⁰ The policy change also encompassed requiring confessors to pass a higher and specific test: the amount of evidence to be provided had to be such as to enable the European Commission to launch an investigation or to issue a statement of objection for infringement of article 81 of the EU Treaty.⁴¹

A further revised EU Leniency Policy was introduced in 2006.⁴² This revised policy introduced a number of significant changes while retaining both the possibility of full immunity for the first firm to self-report before the commencement of an investigation by the commission, and the previous scale of reduction of fines

³² Moodaliyar (n 31) 162.

³³ Kobayashi (n 31) remarks that instead of a race to self-report the 1978 Leniency Program “produced a crawl” (719).

³⁴ Zingales (n 21) 15. Zingales points out that the American Leniency Programme has recognised the importance of providing immunity from criminal fines in order to align the incentives of individuals with those of the company involved in the cartel activity. He mentions that the programme does not offer a hard and fast solution for the downside effect of such an arrangement as the possibilities of follow up antitrust lawsuits in the US are still very high, especially considering that the standard procedure for calculation automatically trebles damages. He however points out that the latter situation is mitigated by the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 Publ Mo 108-237,118 Stat 661 (15 USC), which grants the first confessor to cartel activity a mitigation of the damages awarded and a limitation on the operation of the general principle of joint liability. Bloom “Despite its great success the EC Leniency Policy faces great challenges” 2006 *European Competition Law Annual* 543 556 points out that the aforesaid act increases the incentives of cartel members to turn themselves in as it limits their potential damages in private lawsuits to single damages based on their own role in the cartel, provided that they also cooperate with plaintiffs in the private lawsuit. Other cartel members remain fully liable (on a joint and several basis) for US treble damages based on harm caused by the entire conspiracy (557).

³⁵ European Union corporate leniency policy 1996 OJ 207/4.

³⁶ Zingales (n 21) 28.

³⁷ Moodaliyar (n 31) 162.

³⁸ European Union corporate leniency policy 1996 OJ C 45/3.

³⁹ Zingales (n 21) 28.

⁴⁰ Morgan “Controlling cartels – implications of the EU policy reforms” 2009 *European Management Journal* 1 3.

⁴¹ The key aspects of the 2002 leniency policy were summarised in the European Commission (2002) XXXIInd Report on Competition Policy.

⁴² Commission notice on immunity from fines and reduction of fines in cartel cases, OJ C298, 2006.

available to informants (including those coercing others not to join the cartel) after investigations had commenced.⁴³ Morgan points out that the revised policy links the type of evidence that applicants should submit to qualify for immunity to information needed by the commission to carry out a “targeted inspection” – thus more detailed evidence is required.⁴⁴ A marker system has also been introduced.⁴⁵ It is further emphasised that while applicants need to disclose their participation to the commission, they must not disclose the fact or any content of the leniency application before the commission has introduced a statement of objection.⁴⁶

Various other prominent competition jurisdictions, such as for example the United Kingdom,⁴⁷ Australia,⁴⁸ Canada⁴⁹ and Korea,⁵⁰ also make use of leniency programmes to supplement the powers of their competition authorities in the prevention and detection of cartels.⁵¹ Leniency programmes in competition jurisdictions globally exhibit certain common features such as absolution from and/or reduction of competition fines, requirements relating to the level of information and evidence to be provided and continued co-operation by the applicant for leniency.⁵² Although these programmes exhibit many common features and are continually evolving there currently does not exist one global leniency model of general application to all competition jurisdictions as the various jurisdictions in which these programmes exist have crafted their specific leniency programmes to suit their individual competition laws.⁵³

The 2003 Organisation for Economic Co-operation and Development’s (OECD) *Competition Committee Report*⁵⁴ however identified certain key features of a successful leniency programme, which are summarised as follows by Bloom:⁵⁵

- a) complete immunity from sanctions should be awarded to the first applicant, as it maximises the reward for co-operation;
- b) only the first applicant to apply should receive complete immunity, and if the programme is extended to subsequent applicants, the gap in the reward should be substantial;⁵⁶
- c) the programme should have maximum transparency and certainty;⁵⁷

⁴³ Morgan (n 40) 4.

⁴⁴ Morgan (n 40) 4.

⁴⁵ Morgan (n 40) 4. For an explanation of what a marker system entails see par 2.2.6 below.

⁴⁶ Morgan (n 40) 4.

⁴⁷ Office of Fair Trading “Leniency in cartel cases” available at <http://www.oft.gov.uk/html/comp-act/download/oft436.pdf> (18-07-2013).

⁴⁸ Australian Competition and Consumer Commission Leniency Policy for Cartel Conduct <http://www.accc.gov.au/content/item.phtml?itemId=459479&enodid=28h21> (19-07-2013).

⁴⁹ Canadian leniency policy available at <http://strategies.ic.gc.ca/SSG/ct01990e.html> (19-07-2013).

⁵⁰ Korean leniency policy available at <http://ftc.go.kr/eng/> (19-07-2013).

⁵¹ Bloom (n 34) 556.

⁵² OECD (2003) Hard core cartels – recent progress and challenges ahead <http://www1.oecd.org/publications/e-book/2403011E.PDF> (24-02-2014).

⁵³ Zingales (n 21) 8.

⁵⁴ OECD (2003) (n 52) 22.

⁵⁵ Bloom (n 34) 556.

⁵⁶ This maximises the incentive to be the first to self-report, thus destabilising the cartel. If the returns to the second applicant approximate those that would accrue to the first applicant the result may be that no one would apply.

⁵⁷ Potential applicants should be able to predict as accurately as possible what the outcome of their application will be.

- d) the programme should be available in circumstances in which the competition agency has already begun an investigation;⁵⁸
- e) the competition agency should accord confidentiality to leniency applications and the information resulting therefrom to the maximum extent possible.

These key features were expanded by the International Competition Network (ICN) in its list of “Good practices relating to leniency programs”, which *inter alia* lists the following good practices:⁵⁹

- i) leniency applications should be available both where the competition authority is unaware of the cartel and also where it is aware of the cartel but does not have sufficient evidence to prosecute the cartel members;
- ii) the use of markers because time is of the essence in making a leniency application;
- iii) requiring full and frank disclosure and ongoing cooperation from the leniency applicant;
- iv) providing for lenient treatment for second and subsequent cartel members;
- v) keeping the identity of the leniency applicant and information provided by such applicant confidential;
- vi) maximum transparency and certainty with respect to the requirements for leniency and the application of policies, procedures and practices governing applications for leniency, the conditions for granting leniency and the roles, responsibilities and contact information for officials involved in the implementation of the leniency programme.

It is thus clear that leniency policies are key features of cartel enforcement in many developed competition law jurisdictions.⁶⁰ It is further clear that these policies are not static, but are continuously being honed and refined in order to enhance their effectiveness in detecting, prosecuting and deterring cartels.

2.2 The South African corporate leniency policy

In order to effectively combat cartel activity, the South African Competition Commission, being the primary body tasked with enforcement of the Competition Act, has, in line with various other international jurisdictions, adopted the corporate leniency policy in 2004⁶¹ which policy was revised in 2008.⁶² The corporate leniency policy is set out in a separate policy document and is not contained in the Competition Act. However, the Competition Amendment Act of 2009 proposed certain amendments to the Competition Act which effectively codifies the corporate

⁵⁸ If the cartel members are aware of an investigation and of the possibility that one of them could benefit from leniency, the stability of their agreement is likely to be severely eroded.

⁵⁹ ICN “Drafting and implementing an effective leniency programme” *Anti-Cartel Enforcement Manual* (2006) 12 <http://www.internationalcompetitionnetwork.org/capetown2006/FINALFormattedChapter2-modres.pdf> (12-02-2014).

⁶⁰ Guersent “The fight against secret horizontal agreement in competition policy” in Hawk (ed) *International Antitrust Law and Policy, Fordham Corporate Law* (2003) 43 stated *inter alia* with regard to the European Leniency Policy that “since 1996, the Leniency Program has been the most effective generator of important cases”.

⁶¹ GN 195 of 2004 in *GG 25963* (6-02-2004).

⁶² Corporate leniency policy published under GN 628 in *GG 31604* (23-05-2008).

leniency policy.⁶³ It is to be noted that amendments codifying the policy have not yet been put into effect.⁶⁴

The salient features of the revised 2008 leniency policy in brief include removal of the discretion which the commission had under the 2004 policy in granting immunity, the concept of granting immunity to the first firm to confess to cartel conduct, regardless of whether such firm was a ringleader or instigator of the cartel, the introduction of a marker procedure as well as an oral statements procedure to allow applicants to submit oral information regarding the alleged cartel and the clarification that the applicant's point of contact with the commission is the Enforcement and Exemptions Division.⁶⁵ The 2008 policy is set out in detail below in order to facilitate an appreciation of the exact nature and scope thereof.

2.2.1 Nature of corporate leniency policy

The corporate leniency policy applies only to cartel conduct, and outlines a process through which the South African Competition Commission will grant a self-confessing cartel member,⁶⁶ who is the first to approach the commission, and self-reports on its cartel activity, immunity for its participation in cartel activity upon the cartel member fulfilling specific requirements and conditions set out under the policy.⁶⁷ Currently the corporate leniency policy process is available only to firms that engage in cartel conduct and not to individuals.⁶⁸ Immunity in the context of the corporate leniency policy means that the commission will not subject the successful applicant to adjudication before the tribunal for its involvement in the cartel activity in respect of which the leniency application is made⁶⁹ and will not propose to have any administrative fines imposed on that applicant.⁷⁰ It envisages

⁶³ Competition Amendment Act 1 of 2009. See s 1 and 8 of the Competition Amendment Act, which respectively address the definition of “deserving of leniency” and provide that the competition commission may certify that any particular respondent is deserving of leniency. S 8(a)(1) specifically proposes the amendment of s 50 of the Competition Act *inter alia* by substituting s (1) thereof for the following subsection:

“(1) At any time after (a) receiving or initiating a complaint, the Competition Commission may certify, in the prescribed manner and form, and with or without conditions, that any particular respondent, or any particular person contemplated in section 73A, is *deserving of leniency in the circumstances*, and (b) initiating a complaint, the Commission may refer the complainant to the Competition Tribunal in respect of any respondent, to the extent that the respondent has not been certified as being *deserving of leniency* in terms of paragraph (a).”

Further amendments to s 50 relating to leniency are also contained in s 8(a)(2) to (e). S 1 of the amendment act contains a further proposed amendment which defines the word “respondent” to mean “a firm against whom a complaint of a prohibited practice has been initiated *or submitted* [our emphasis] in terms of this Act.”

⁶⁴ The reason why the proposed codification is not yet in operation appears to be due to its links to the proposed s 73A, as discussed in par 4 hereof.

⁶⁵ For a detailed overview of the CLP and the amendments thereto see Lavoie “South Africa’s corporate leniency policy: a five year review” available at <http://www.comp.co.za/assets/uploads/events/10-year-review/parallel-3b/clp-paper-conference-Chantal-Lavoie.docx> (02-08-2013).

⁶⁶ Regardless of its role in the cartel.

⁶⁷ par 3 1 of CLP document. It is however important to note that par 5.9 of the CLP document expressly states that the reporting of cartel activity by individual (unauthorised) employees of a firm or by a person not authorised to act for such a firm will only amount to whistle-blowing and not to an application for immunity under the CLP.

⁶⁸ As discussed below in par 3, directors and managers of a firm will however be able to apply to the national prosecuting authority for immunity from criminal prosecution once the proposed s 73A, introduced by s 12 of the Competition Amendment Act 1 of 2009, is put into operation.

⁶⁹ par 3.3 of the CLP document.

⁷⁰ par 3.3 of the CLP document.

not only a situation where the applicant alerts the commission of the existence of cartel activity, but also one that would culminate in a referral, and ultimately in a final determination made by the competition tribunal, of such reported cartel activity, with the applicant co-operating against the other members of the cartel.⁷¹ The existence of the corporate leniency policy does however not detract from the commission's powers to investigate a cartel in terms of the Competition Act.⁷²

2.2.2 Scope of application of corporate leniency policy

The corporate leniency policy process, which is undertaken on a confidential basis,⁷³ is applicable only in respect of alleged cartels entered into, or which have an effect within, South Africa.⁷⁴ In essence the corporate leniency policy is aimed at cartel activity:⁷⁵

- (a) which the commission is not aware of;
- (b) which the commission is aware of but in relation to which it has insufficient information, and no investigation has been initiated yet; or
- (c) in respect of pending investigations and investigations already initiated by the commission but, having assessed the matter, the commission is of the view that it has insufficient evidence to prosecute the firms involved in the cartel activity.

No "blanket immunity" is provided for, but immunity can be granted in respect of separate and various cartel activities provided the applicant meets the requirements for each contravention reported.⁷⁶

Although no leniency is granted in terms of the corporate leniency policy to other cartel members who were not "first to the door", it is provided that if other members of the cartel wish to come clean on their involvement in a cartel to which the first leniency applicant has already confessed, the commission may explore other processes outside the corporate leniency policy, which may result in the reduction of a fine, a settlement agreement or a consent order.⁷⁷

It should however be noted that the leniency granted applies to administrative fines only and does not limit the rights of any person injured by cartel activity in respect of which the commission has granted immunity under the corporate leniency policy to seek civil⁷⁸ or criminal remedies.⁷⁹ Should the applicant for leniency

⁷¹ par 3.3 of the CLP document.

⁷² par 3.3 of the CLP document.

⁷³ par 6.2 of the CLP document. Disclosure of any information submitted by the applicant prior to immunity being granted during this process is made with the consent of the applicant, which consent may not be unreasonably withheld.

⁷⁴ par 5.1 and 5.2 of the CLP document.

⁷⁵ par 5.5 of CLP document.

⁷⁶ par 5.4 of CLP document.

⁷⁷ Par 5.6 of the CLP document provides that in the event that the matter is referred for adjudication to the tribunal, the commission may consider at its discretion asking the tribunal for favourable treatment of the applicants who were not "first to the door" to apply for immunity pursuant to the CLP. Note 5 of the CLP document explains that "favourable treatment" implies a substantial or minimum reduced fine from the one prescribed, which will be dictated by the nature and circumstances of each case as well as the level of co-operation given.

⁷⁸ A right to bring a civil claim for damages arising from a prohibited practice comes into existence on the date that the tribunal made a determination in respect of a matter that affects that person, or in the case of an appeal, as per s 65(9), on the date that the appeal process in respect of that matter is concluded.

⁷⁹ par 6.4 of CLP document.

wish to withdraw its application after it has been submitted to the commission, the drawback is that it runs the risk of nevertheless being prosecuted for the cartel activity.⁸⁰

2.2.3 Forms of immunity available in terms of corporate leniency policy

The corporate leniency policy provides for three outcomes of a leniency application, namely conditional immunity, total immunity and no immunity. “Conditional immunity” is given in writing to an applicant at the initial stage of the application in order to foster a good atmosphere and trust between the applicant and the commission pending finalisation of the infringement proceedings.⁸¹ Revocation of conditional immunity may occur at any time⁸² if the applicant fails to meet the conditions and requirements of the corporate leniency policy and also in the event of lack of co-operation by the applicant, provision of false or insufficient information, misrepresentation of facts and dishonesty.⁸³ Where conditional immunity is revoked, the commission has the discretion to pursue the matter in terms of the relevant provisions of the act.⁸⁴

Total immunity is granted after the commission has completed its investigation and referred the matter to the tribunal and once a final determination has been made by the tribunal or the competition appeal court, as the case may be, provided the applicant has met the conditions and requirements set out in the corporate leniency policy on a continuous basis throughout the proceedings.⁸⁵

“No immunity” applies in those cases where the applicant fails to meet the requirements and conditions under the corporate leniency policy.⁸⁶ If immunity is not granted, the commission is at liberty to investigate and prosecute the applicant regarding the cartel activity.⁸⁷

2.2.4 Requirements and conditions for immunity

It is provided that the applicant for immunity under the corporate leniency policy *will*⁸⁸ qualify for immunity if it meets the following conditions and requirements:

⁸⁰ par 11.1.5.2 of the CLP document.

⁸¹ par 13 of the CLP document.

⁸² par 13.1 of the CLP document. The commission will revoke a conditional immunity in writing.

⁸³ par 13.3 of the CLP document. In this regard reference is also made to s 73(2)(d) of the act, which provides that a person commits an offence when he knowingly provides false information to the commission (par 13.4 of the CLP document). Thus an applicant whose immunity has been revoked by the commission based on the provision of false information will be liable to penalties stipulated in s 74(1)(b) of the act, if convicted of such an offence.

⁸⁴ par 13.5 of the CLP document.

⁸⁵ par 13.5 of the CLP document.

⁸⁶ par 9.1.3.1 of the CLP document. This would for instance be in situations where the commission already has enough evidence about the cartel conduct to justify a prosecution regardless of the evidence that can be submitted by the leniency applicant or where the leniency applicant withholds relevant information or is not truthful.

⁸⁷ par 9.1.3.2 of the CLP document. The commission may consider a settlement agreement or a consent order, or where a matter is referred, asking the tribunal for a reduction of fine in respect of the successful applicant. An applicant that does not meet all the requirements for immunity but wishes to be considered for some form of favourable treatment may also approach the commission for a possible settlement of the matter.

⁸⁸ authors' emphasis.

- (a) the applicant must honestly provide the commission with complete and truthful disclosure of all evidence, information and documents in its possession or under its control relating to any cartel activity;
- (b) the applicant must be the first applicant to provide the commission with information, evidence and documents sufficient to allow the commission, in its view, to institute proceedings in relation to a cartel activity;
- (c) the applicant must offer full and expeditious co-operation to the commission concerning the reported cartel activity.⁸⁹
- (d) the applicant must immediately stop the cartel activity or act as directed by the commission;
- (e) the applicant must not alert other cartel members or any other third party that it has applied for immunity;
- (f) the applicant must not destroy, falsify or conceal information, evidence and documents relevant to any cartel activity; and
- (g) the applicant must not make a misrepresentation concerning the material facts of any cartel activity or act dishonestly.

2.2.5 The corporate leniency process

During the corporate leniency process the commission is given the discretion to exercise some flexibility where necessary to achieve the desired outcome.⁹⁰ In brief, the procedure entails first contact with the commission, where the applicant, who is not required to disclose its identity at this initial stage, must make an application for immunity in writing to the manager of the cartels division of the commission.⁹¹ The application must contain information substantial enough to enable the commission to identify the cartel conduct and its participants in order to determine whether or not any other application for immunity has been made in respect of the same conduct.⁹² At this stage the applicant may also apply to the commission to request that information regarding the alleged cartel be provided orally.⁹³

⁸⁹ Such co-operation should be continuously offered until the commission's investigations are finalised and the subsequent proceedings in the tribunal or the appeal court are completed.

⁹⁰ par 11.1 of the CLP document. The commission may in certain circumstances choose to use other forms of communicating with the applicant without having a meeting.

⁹¹ par 11.1.1.1 of the CLP document. The application can be delivered by hand, facsimile or electronic mail.

⁹² par 11.1.1.1 of the CLP document. If another firm has already made an application in respect of the same conduct, the commission must advise the applicant accordingly in writing or by telephone within five days, or within a reasonable period, after receipt of its application for leniency. If no firm has made an application already, the commission must advise the applicant accordingly in writing or by telephone. The applicant must thereafter within five days, or within a reasonable period after such advice from the commission, make an arrangement for a first meeting with the commission.

⁹³ par 15.1 of the CLP document. The commission may, at its discretion and on a case-by-case basis, accept such request from an applicant. Subject to par 12.1 of the CLP document the applicant will nevertheless be required to provide the commission with all existing written information, evidence and documents in its possession regarding the alleged cartel. In terms of par 15.2 oral statements will be recorded and transcribed at the commission's premises. The applicant may review the technical accuracy of the recording and transcript and correct the content of its oral statements within a reasonable time period to be determined at the discretion of the commission. Upon expiry of the relevant time period, the oral statements, corrected as the case may be, will be deemed to be approved and will amount to restricted information forming part of the commission's records pursuant to rule 14 of the Rules for the Conduct of Proceedings in the Competition Commission.

Thereafter a first meeting with the commission takes place to find out whether the applicant's case would qualify for immunity under the corporate leniency policy.⁹⁴ At this meeting the applicant must bring all the relevant information, evidence and documents at its disposal, whether written or oral, relating to the cartel activity for consideration by the commission.⁹⁵ The applicant must reveal its full identity and answer all the questions that the commission may ask in relation to conduct being reported or matters relating thereto.⁹⁶ If the commission decides that the applicant meets the relevant conditions and requirements, arrangements for a second meeting will be made.⁹⁷ Should the commission however decide that the applicant does not qualify for immunity, the applicant will be advised thereof in writing and this would then be regarded as "no immunity".⁹⁸

If the commission does arrange a second meeting its purpose will be to discuss and grant conditional immunity to the applicant pending finalisation of any further investigations by the commission in the matter and final determination thereof by the tribunal or the competition appeal court, as the case may be.⁹⁹ At this stage the applicant will be required to bring forward any other relevant information, evidence and documents that it may still have in its possession or under its control, whether written or oral.¹⁰⁰ A written agreement between the applicant and the commission, known as the "conditional immunity agreement", will then be agreed upon between the applicant and the commission.¹⁰¹

After the granting of conditional immunity, the commission will continue with its investigations relating to the relevant cartel activity.¹⁰² Once it has completed the investigation and is satisfied that it has sufficient information to institute proceedings, it will inform the applicant during a final meeting.¹⁰³ Should the commission however not be satisfied it can call a further meeting with the applicant either to revoke the conditional immunity or to solicit further documents or information so as to enable the commission to complete the investigation.¹⁰⁴ The purpose of the final meeting is to inform the applicant that the commission intends to institute proceedings in relation to the alleged cartel and to request the applicant to co-operate fully and expeditiously in the proceedings.¹⁰⁵

⁹⁴ par 11.1.2.2 of the CLP document. At this stage the commission may only have sight of and peruse all the documents in possession of the applicant but not make copies thereof.

⁹⁵ par 11.1.2.1 of the CLP document.

⁹⁶ The commission must within five days, or within a reasonable time, after the date of the first meeting make a decision on whether or not the applicant's case qualifies for immunity and inform the applicant accordingly in writing.

⁹⁷ par 11.1.2.3 of the CLP document.

⁹⁸ par 11.1.2.4 of the CLP document.

⁹⁹ par 11.1.3.1 of the CLP document.

¹⁰⁰ par 11.1.3.1 of the CLP document. The commission may make copies of all documents provided.

¹⁰¹ par 11.1.3.2 of the CLP document.

¹⁰² par 11.1.4.1 of the CLP document.

¹⁰³ par 11.1.4.2 of the CLP document.

¹⁰⁴ par 11.1.4.2 of the CLP document.

¹⁰⁵ par 11.1.5.1 of the CLP document. Conditional immunity will continue to apply until the tribunal or the competition appeal court, as the case may be, has reached a final decision regarding the matter.

2.2.6 Placing of a marker

Prior to making an application for immunity a prospective applicant may choose to apply to the commission for a “marker”.¹⁰⁶ This will happen where the applicant wants to self-report on the cartel activity but is still in the process of gathering the relevant information and evidence regarding the cartel activity. The commission may then at its discretion grant the marker to protect the applicant’s place in the queue of applications for immunity.¹⁰⁷ In granting the marker, the commission will determine the period of time within which the applicant must provide the necessary information, evidence and documents required to meet the conditions and requirements set out in the corporate leniency policy.¹⁰⁸ If the applicant at a later stage submits an application for immunity along with the necessary information, evidence and documents within the time limit determined by the commission, such application for immunity will be deemed to have been made on the date that the marker application was granted by the commission.¹⁰⁹

2.2.7 Concluding remarks

Having regard to the features of the South African leniency policy and the extent to which it measures up to the features of efficient leniency policies as set out above, it is submitted that such policy is advanced and can be regarded as largely on par with leniency programmes in developed jurisdictions such as the United States and the European Union. The leniency policy furthermore has a good track record in assisting with the exposure and prosecution of cartels in, or having an effect in, South Africa.¹¹⁰ However, as discussed below, the application of the South African corporate leniency policy is not without its challenges.

3 Court challenge to the corporate leniency policy

3.1 The high court decision in *Agri Wire Pty (Ltd) v The Commissioner of the Competition Commission*¹¹¹

As indicated above, the corporate leniency policy is set out in a separate policy document not contained in the Competition Act, and the codification of the policy in terms of the 2009 Competition Amendment Act has not yet been put into effect. A challenge to the validity of the corporate leniency policy was recently brought via a review application before the North Gauteng high court in *Agri Wire (Pty) Ltd v The Commissioner of the Competition Commission*. The facts were that the applicants and the third to twelfth respondents were competitors in the manufacture

¹⁰⁶ par 12 1. The marker application is made in writing to the manager cartels division at the commission and delivered by hand, facsimile or email. The marker application must identify that it is being made to request a marker and must further identify the applicant’s name and address, the alleged cartel conduct and its participants, and it must justify the need for a marker.

¹⁰⁷ par 12.2 of the CLP document.

¹⁰⁸ par 12.2 of the CLP document.

¹⁰⁹ par 12.2 of the CLP document.

¹¹⁰ *Unleashing Rivalry Ten Years of Enforcement by the South African Competition Authorities* (report published in 2009 by the South African competition commission and tribunal). See also globalcompetitionreview.com/reviews/59/.../South-africa-cartels/ (27-02-2014).

¹¹¹ (7585/10) 2011 ZAGPPHC 117 (5-07-2011). The review application before the high court was brought at a stage that the commission’s referral of the complaint to the tribunal was still pending and was yet to be decided.

and distribution of wire and wire-related products in South Africa and elsewhere.¹¹² In July 2008 the third respondent, Consolidated Wire Industries (Pty) Ltd, applied to the commission for conditional immunity under the corporate leniency policy in exchange for evidence revealing that, together with the applicants and the fourth up to the twelfth respondents, it had been engaged in cartel conduct prohibited by the Competition Act.¹¹³ The commission granted the third respondent conditional immunity under the corporate leniency policy.¹¹⁴ The commission then initiated a complaint and embarked upon an investigation of the alleged cartel contraventions.¹¹⁵ On the strength of the information and evidence provided by the third respondent the commission formed the view that the applicants and the third up to the twelfth respondents had engaged in conduct prohibited by section 4(1)(b)(i),(ii) and (iii) of the Competition Act which involved price fixing, allocation of markets and collusive tendering.¹¹⁶ A complaint was subsequently referred to the tribunal in which the applicants and the third to the twelfth respondent were cited as respondents.¹¹⁷ In the referral of the complaint to the tribunal it was stated that no relief was being sought against the third respondent, as it was granted conditional immunity by the competition commission.¹¹⁸

The applicants however contended that the commission had no authority to grant immunity to a cartel member and because it had no such authority it also had no authority or right to make a leniency promise to the third respondent – therefore the promise as well as the grant of conditional immunity to the third respondent was unlawful.¹¹⁹ They further contended that in failing to seek relief against the third respondent in the tribunal proceedings while seeking relief against the other cartel members, the commission acted selectively.¹²⁰ It was also contended that because the commission had no authority to grant the third respondent conditional immunity, the initiation and referral of the complaint to the tribunal was unlawful.¹²¹

The court *inter alia* held that if immunity under the corporate leniency policy is said to be conditional immunity,¹²² it simply means that the commission's promise is made provisionally pending the finalisation of the matter and on condition that such party continues to fulfil the requirements and conditions stipulated in the corporate leniency policy.¹²³ The court further held that the granting of conditional immunity

¹¹² the *Agri Wire* case (n 111) par 9. All references hereinafter under this specific heading to paragraphs are to paragraphs of the GNHC-judgment unless indicated otherwise.

¹¹³ the *Agri Wire* case (n 111) par 9.

¹¹⁴ the *Agri Wire* case (n 111) par 10.

¹¹⁵ the *Agri Wire* case (n 111) par 10.

¹¹⁶ the *Agri Wire* case (n 111) par 10.

¹¹⁷ the *Agri Wire* case (n 111) par 10.

¹¹⁸ the *Agri Wire* case (n 111) par 11. It was stated that the third respondent was cited purely for the interest it could have had in the proceedings relating to the complaint in the tribunal. An order was however asked from the tribunal against the other alleged cartel members declaring that they had contravened s 4(1)(b)(i),(ii) and (ii), directing them to refrain from engaging in the aforesaid conduct, requiring the levying of an administrative penalty and further and/or alternative relief.

¹¹⁹ the *Agri Wire* case (n 111) par 30.

¹²⁰ the *Agri Wire* case (n 111) par 30.

¹²¹ the *Agri Wire* case (n 111) par 31.

¹²² According to the court conditional immunity is “to some extent (but not completely) like an interim order that is granted by the high court pending the return day. If on the return day, the applicant shows that it meets the requirements for final relief, the rule is discharged. In the case of conditional immunity, if at the end of the referral proceedings the party concerned has met the requirements for permanent immunity, permanent immunity is granted. If it has not met the requirements, permanent immunity is not granted” (the *Agri Wire* case (n 111) par 58).

¹²³ the *Agri Wire* case (n 111) par 58.

by the commission in terms of the corporate leniency policy is not the granting of immunity in the normal sense, because paragraph 3.3 of the corporate leniency policy does not define immunity in the sense of giving the commission the final say on what happens or does not happen to the party concerned: it remarked that nothing in the corporate leniency policy states that the tribunal is *obliged*¹²⁴ not to impose a fine on a party if the commission asks it not to.¹²⁵

It indicated that in terms of section 49B of the act the commission is empowered to initiate a complaint against an alleged prohibited practice and that in terms of section 2(1)(f) it is responsible for negotiating and concluding consent orders.¹²⁶ It further indicated that if the commission can be a party to an agreement that can later be made a consent order it obviously also can, in terms of the act, promise a leniency applicant that it will ask the tribunal not to impose a fine on such a party if the latter gives it full co-operation such as is required under the corporate leniency policy.¹²⁷

The court then declared.¹²⁸

“At the end of the referral proceedings, if the third respondent or a party in its position, has met all the conditions and requirements for immunity under the corporate leniency policy, the Commission will ask the Tribunal not to impose a fine on such a party and, *if the Tribunal accepts that*,¹²⁹ it will not impose a fine on such a party.”¹³⁰

Regarding the allegation of selective prosecution, the court indicated that a prohibited practice in which a number of applicants took part does not cease to be a prohibited practice simply because the commissioner initiates a complaint about such practice in relation only to some and not all the participants in the practice.¹³¹ The court subsequently dismissed the application with costs, whereafter the applicants approached the supreme court of appeal with their challenge against the corporate leniency policy.

3.2 The supreme court of appeal judgment in *Agri Wire (Pty) Ltd v The Commissioner of the Competition Commission*¹³²

In the matter before the supreme court of appeal the appellants based their challenge to the corporate leniency policy on the assertion that the commission is a creature of statute and has only those powers conferred upon it under the Competition Act.¹³³ It

¹²⁴ own emphasis.

¹²⁵ The court indicated that even if there was something in the CLP to that effect it would not in law have been binding on the tribunal. Accordingly there is the acknowledgment that the tribunal has the final authority whether or not a fine is imposed on a respondent before the tribunal.

¹²⁶ *ibid.*

¹²⁷ the *Agri Wire* case (n 111) par 67. The court stated that there is no reason why such an agreement cannot be said to be an agreement as contemplated by s 49D and s 58(1)(b).

¹²⁸ the *Agri Wire* case (n 111) par 67.

¹²⁹ own emphasis.

¹³⁰ It further remarked: “In terms of section 58(1)(a)(iii) read with sec 59 of the Act the imposition of a fine lies within the discretion of the Tribunal. I am satisfied that the Tribunal will be acting within its discretion if, in an appropriate case, it decides not to impose a fine on a party which is a respondent before it if such party has helped the Commission in a manner such as contemplated in the CLP ... In that way then such party will have been saved from having a fine imposed upon it. The Commission and such party can at the end of the referral proceedings hand up an agreement that no fine is to be imposed on such party and ask the Tribunal to make it a consent order and the Tribunal may, in its discretion, make it an order...”

¹³¹ the *Agri Wire* case (n 111) par 69.

¹³² 2012 4 All SA 365 (SCA).

¹³³ the *Agri Wire* SCA case (n 132) par 5.

was argued that the act does not permit the commission to be selective in deciding which participants in a cartel it investigates and makes the subject of a referral to the tribunal, nor does it authorise the commission to grant immunity from a referral and a possible adverse adjudication, including the imposition of an administrative penalty, in consideration for the furnishing of information under the corporate leniency policy.¹³⁴ It was further argued that if the commission refers a complaint regarding participation to the tribunal, it is obliged to refer the complaint in respect of *all* the participants and to seek relief against *all* of them.¹³⁵ The most it can do to ameliorate the position of a whistle-blower is to ask the tribunal to take its co-operation into account in assessing the amount of any administrative penalty, as it is entitled to do under section 59(3)(f) of the act.¹³⁶

The court however indicated that a conspicuous feature of the corporate leniency policy is that wherever it refers to immunity being granted, it identifies the commission¹³⁷ as the party that grants that immunity.¹³⁸ It remarked that the corporate leniency policy nowhere suggests that the entitlement to total immunity is dependent upon the tribunal, acting within its own unfettered discretion, not imposing a penalty on the applicant for immunity.¹³⁹ It further indicated that the distinction drawn between conditional immunity and total immunity makes no sense if the tribunal is entitled to ignore the commission's granting of conditional immunity and impose administrative penalties upon the party to whom such immunity had been granted.¹⁴⁰

The supreme court of appeal thus held that there can be no doubt that the adoption of such policy is competent for the following reasons:¹⁴¹

“[T]he purpose of the Act, as set out in section 2 thereof, is to promote competition in South Africa. To that end the Commission is empowered to promote market transparency and to investigate and evaluate alleged contraventions of Chapter 2 of the Act, under which cartels fall. Breaking up cartels serves to promote market transparency, as cartel behaviour is the antithesis of transparency in the marketplace. Investigating contraventions of the Act must entitle the Commission to put in place measures that will perform this function. That is the whole purpose of the CLP. Accordingly ... the Commission was empowered under the Act to adopt and implement the CLP by giving conditional and total immunity to parties who make disclosure and provide evidence that enables it to pursue cartels and bring them to an end.”

The court then dealt with the contention that whilst the adoption of the corporate leniency policy may have been permissible in general terms, it was impermissible for it to provide that immunity would be granted by the commission and that the

¹³⁴ the *Agri Wire* SCA case (n 132) par 5.

¹³⁵ own emphasis.

¹³⁶ the *Agri Wire* SCA case (n 132) par 5.

¹³⁷ own emphasis.

¹³⁸ the *Agri Wire* SCA case (n 132) par 7.

¹³⁹ the *Agri Wire* SCA case (n 132) par 7.

¹⁴⁰ the *Agri Wire* SCA case (n 132) par 7. In this regard the court significantly remarked: “It would be small comfort to the recipient to know that it had received total immunity if it had nonetheless been ordered to pay ten per cent of its annual turnover during the years of the cartel's existence as an administrative penalty. We venture to suggest that the CLP would be far less effective, if not entirely useless, if it contained a disclaimer to the effect that the Commission would not seek an order against the party seeking leniency, but that the Tribunal would be free to impose such an administrative penalty as the Act permitted against them. Hard-headed businessmen, contemplating barring their souls to the competition authorities, will generally want a more secure undertaking of a tangible benefit, before furnishing the co-operation that the Commission seeks from them.”

¹⁴¹ the *Agri Wire* SCA case (n 132) par 7.

granting of immunity is a prerogative of the tribunal when exercising its powers in determining an appropriate penalty under section 59 of the act.¹⁴² It however rejected this contention and indicated that the fact that the tribunal can take a party's co-operation into account does not have as a corollary that the commission may not grant immunity.¹⁴³ Thus it held that the application was correctly dismissed by the court *a quo*, albeit for different reasons, and consequently the appeal was also dismissed with costs.¹⁴⁴

3.3 Comments

Although the high court and supreme court of appeal briefly commented on the secretive nature of cartels, which led to the implementation of leniency programmes in order to combat cartels, there was no detailed consideration of the concept of and rationale for a competition leniency policy, although it would clearly have been a good starting point for setting the scene for the investigation into the lawfulness of the corporate leniency programme. The high court failed to properly consider the stated purposes of the act or the powers of the commission in order to establish a basis for the validity of the corporate leniency policy and was furthermore misguided in its perception that it is the tribunal, and not the commission, that has the final say about immunity under the corporate leniency programme. Sutherland correctly points out that on the interpretation of the high court, the concept of immunity against adjudication, in particular, and the concept of immunity against the imposition of a fine, has a very narrow meaning, which means that the tribunal is not bound by the views of the commission that the leniency applicant should not be fined but the tribunal will at most attach "considerable weight" to the views of the commission.¹⁴⁵ He adds that the high court has made matters worse by suggesting that other parties who object to immunity may apply to participate in proceedings in an attempt to convince the tribunal to impose a fine on a party who received immunity.¹⁴⁶

The supreme court of appeal however correctly identified the commission as the grantor of immunity and the commission's statutory mandate to promote competition through promotion of market transparency as the basis for its authority to adopt and act in accordance with the corporate leniency programme. Unfortunately, as Sutherland points out, the fact that the supreme court of appeal removes the discretion of the tribunal, thus providing wider protection to leniency applicants, is not without problems for the following reasons:¹⁴⁷ first, the aforementioned justification of the court is terse and not entirely convincing, as it is doubtful whether section 50(3) (which allows the commission to refer parts of complaints in the instance where a complaint is not initiated by it) can be used as justification for the proposition that it is possible in all cases. In fact, according to Sutherland, it would seem that the opposite is true. Secondly, he submits that the court did not really address the issue whether the commission could conclude agreements with parties against whom complaints were made and remarks that such an agreement will probably have to be the subject of a consent order in terms of section 49D before it will acquire legal force. The effect is that without a consent order a person who has been granted

¹⁴² the *Agri Wire* SCA case (n 132) par 23.

¹⁴³ the *Agri Wire* SCA case (n 132) par 23.

¹⁴⁴ the *Agri Wire* SCA case (n 132) par 23.

¹⁴⁵ Sutherland and Kemp (n 13) par 5 9.1.3.

¹⁴⁶ Sutherland and Kemp (n 13) par 5 9.1.3.

¹⁴⁷ Sutherland and Kemp (n 13) par 5 9.1.3.

immunity will still be open to prosecution through a referral by the complainant¹⁴⁸ or the making of a new complaint by an aggrieved party.¹⁴⁹ He thus cautions that the judgment of the supreme court of appeal should therefore be accepted subject to the qualification that the commission should obtain consent orders for parties who have received immunity.¹⁵⁰

Once the proposed codification of the corporate leniency policy is put into operation¹⁵¹ it will legislatively fortify the lawfulness of the corporate leniency policy, although such codification will not necessarily absolve the policy from further court challenges. For the time being though, it seems that the aforementioned challenge to the lawfulness of the corporate leniency policy in the *Agri Wire* matter has been disposed of, absent a challenge brought before the constitutional court based *inter alia* on the argument that the “selective” treatment of cartelists contravenes the equality provision in section 9 of the constitution¹⁵² or that it leads to unequal treatment of firms who are engaged in prohibited practices because it gives preferential treatment in the form of immunity and absolution from administrative fines to cartelists whilst such preferential treatment is not available in respect of contravention of other prohibited practices in terms of the Competition Act. In such event it is submitted that if it should be held that the corporate leniency policy infringes upon a person’s right to equality, it is likely to pass constitutional muster on the basis of being reasonable and justifiable in terms of the limitation clause contained in section 36¹⁵³ of the constitution as no less restrictive means could be adopted to achieve the purpose which the said policy serves in cartel enforcement. In respect of the second possible constitutional challenge, the fact that cartels are regarded as the most egregious of competition transgressions and their harmful effect on the economy is very severe and often affects the most vulnerable consumers may in all likelihood also cause the corporate leniency policy to pass constitutional muster.

4 *Legislative challenge to the corporate leniency policy*

However, there lurks another challenge of a legislative nature which, if put into effect in its current format, may significantly impact on the corporate leniency policy as an effective tool in combating cartel activity.¹⁵⁴ This challenge relates to the criminalisation of the act of causing a firm to engage in a cartel or knowingly acquiescing in the firm’s cartel participation, in accordance with section 73A as inserted into the Competition Act by the 2009 Competition Amendment Act,¹⁵⁵ which section has sparked much controversy, and, despite the enactment of the

¹⁴⁸ Where an outside party complained.

¹⁴⁹ Where the commission initiated a complaint.

¹⁵⁰ own emphasis.

¹⁵¹ See the discussion in par 2 hereof.

¹⁵² S 9 of the Constitution of the Republic of South Africa, 1996, states that everyone is equal before the law and has the right to equal protection and benefit of the law.

¹⁵³ S 36 of the constitution provides for the limitation of rights mentioned in the bill of rights (which includes the right to equality) in the following terms: “36(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including – the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; less restrictive means to achieve the purpose.”

¹⁵⁴ See Kelly “The introduction of a cartel offence into South African law” 2010 *Stell LR* 321.

¹⁵⁵ 1 of 2009.

Amendment Act, has not yet been put into effect. Section 73A creates a statutory cartel offence by providing that a person commits an offence if, while being a director of a firm or while engaged or purporting to be engaged by a firm in a position having management authority within the firm, such person caused the firm to engage in a prohibited practice in terms of section 4(1)(b), or knowingly acquiesced¹⁵⁶ in the firm engaging in a prohibited practice in terms of section 4(1)(b).¹⁵⁷

Subject to subsection (4), a person may be prosecuted for an offence in terms of section 73A only if the relevant firm has acknowledged, in a consent order contemplated in section 49D,¹⁵⁸ that it engaged in a prohibited practice in terms of section 4(1)(b); or the competition tribunal or the competition appeal court has made a finding that the relevant firm engaged in a prohibited practice in terms of section 4(1)(b).¹⁵⁹ Section 73A(4) however provides that the competition commission may not seek or request the prosecution of a person for an offence in terms of section 73A if the commission has certified that the person is deserving of leniency¹⁶⁰ in the circumstances; and may make submissions to the national prosecuting authority in support of leniency for any person prosecuted of an offence in terms of this section, if the competition commission has certified that the person is deserving of leniency in the circumstances.

Significantly, it is also provided that a firm may not directly or indirectly pay any fine that may be imposed on a person convicted of an offence in terms of the proposed section 73A, or indemnify, reimburse, compensate or otherwise defray the expenses of a person incurred in defending against a prosecution in terms of the section, unless the prosecution is abandoned or the person is acquitted.¹⁶¹ Directors of companies that caused or knowingly acquiesced in the companies' cartel participation can be prosecuted personally in the criminal courts and, if found guilty, can face fines of up to R500 000 or imprisonment of up to ten years or both.¹⁶²

Section 73A has not been met with enthusiasm by the South African competition authorities,¹⁶³ and clearly the statutory criminalisation of the act of causing a firm to participate in a cartel or knowingly acquiescing in such participation, as envisaged in the said section, will not find favour with companies who are clandestinely participating in cartels. The criticism against the section appears to be not so much the fact that it specifically criminalises causing or knowingly acquiescing in cartel participation, but rather that the manner in which it is currently drafted may erode the effectiveness of the corporate leniency policy and that the practical implementation of the section which envisages involvement by the competition authorities as well as the national prosecuting authority will be extremely problematic and will impact

¹⁵⁶ s 73A(2) explains that for the purpose of s 73A(1)(b) "knowingly acquiesced" means having acquiesced while having actual knowledge of the relevant conduct by the firm.

¹⁵⁷ s 73A(1). See further par 1 above for a discussion of s 4 of the Competition Act.

¹⁵⁸ It is provided in s 73A(5) that in any court proceedings against a person in terms of s 73A, an acknowledgement in a consent order contemplated in s 49D by the firm or a finding by the competition tribunal or the competition appeal court that the firm has engaged in a prohibited practice in terms of s 4(1)(b) is *prima facie* proof of the fact that the firm engaged in that conduct.

¹⁵⁹ s 73A(3).

¹⁶⁰ See the explanation of "deserving of leniency" in n 63 above.

¹⁶¹ s 73A(6).

¹⁶² s 73A(6).

¹⁶³ It has been cautioned by Lewis, former chairperson of the South African Competition Commission, that the criminal justice system in South Africa is already too overburdened to give criminal enforcement of competition law the priority it deserves. See "Don't jail offenders – competition boss" *Moneyweb* [http://www.moneyweb.co.za/mw/view/mw/en/page295050/oid=173839&snDetail&pid=1743\(31-07-2013\)](http://www.moneyweb.co.za/mw/view/mw/en/page295050/oid=173839&snDetail&pid=1743(31-07-2013)).

negatively on cartel enforcement.¹⁶⁴ To date, the national prosecuting authority has no experience in competition enforcement and its jurisdiction to prosecute cartel offences, and in particular the fact that the competition commission's granting of immunity to a leniency applicant does not translate into automatic absolution from criminal prosecution by the national prosecuting authority raises concerns about expertise, coordination of cartel cases and the critical issue of state resources.¹⁶⁵ In this regard Kelly validly laments that the South African legislature did not implement a framework that either gave greater investigative and prosecutorial powers to the competition commission in respect of the proposed section 73A, or a framework that includes more detail with respect to the manner in which the national prosecuting authority and the competition commission are to coordinate their proceedings.¹⁶⁶

It is submitted that the concern that section 73A, if implemented in its current format, may be the catalyst for the demise of the corporate leniency policy is a very real one: the section has the potential to inhibit firms which participate in cartel activity from blowing the whistle on their fellow cartel members, as it may become too risky for such firms to self-report on their cartel involvement. This is because an applicant who decides to self-report is in any event at risk of not being first to the door and thus not receiving immunity under the corporate leniency policy in the first place. In addition to the risk that a whistle-blowing firm faces in regard to the possibility of not receiving immunity against enforcement by the competition authorities pursuant to confessing its cartel involvement, the directors or managers of the whistle-blower face the further risk of being criminally prosecuted for the cartel offence (namely, causing or knowingly acquiescing in the firm's cartel participation) which they have exposed to the competition authorities in the course of the leniency application. These directors or managers bear the risk of being imprisoned for an extensive period of time, and criminal fines will have to be paid out of their own pockets, as the firms that employ them are prohibited from paying such fines or any of their legal representation costs. It should also be borne in mind that the corporate leniency policy does not provide immunity against civil claims regarding damages suffered as a result of cartel conduct, which compounds the risk for the cartel-participating firm and its directors and managers. Thus it can be expected that firms that participate in cartel activity will be reluctant to "bare all" given the scope of the risks involved. For individuals such as directors and managers it appears to be not so much the possible imposition of a criminal fine that is viewed with dread but the possibility of a lengthy period of imprisonment and the stigma attached thereto, and

¹⁶⁴ Kelly (n 154) 321.

¹⁶⁵ Kelly (n 154) 328. He comments that it is likely that within the national prosecuting authority it will be the relatively small specialised commercial crimes unit that will have the responsibility for prosecuting individuals under s 73A, and that this unit may not have the necessary expertise or resources required for the task.

¹⁶⁶ Kelly (n 154) 329. See, however, Jordaan and Munyai "The constitutional implications of the new section 73A of the Competition Act 89 of 1998" 2011 *SA Merc LJ* 197 203, where the opinion is expressed that the co-operation between the competition commission and the national prosecuting authority may not be as problematic as predicted given that the commission has already established some memorandums of understanding or guidelines on co-operation with other institutions in areas of concurrent or complementary jurisdictions, which appear to be working well. This view should however also be contrasted with the views expressed by competition law practitioners Lopes, Seth and Gauntlett "Cartel enforcement, the CLP and criminal liability – are competition regulators hamstrung by the Competition Act from co-operating with the NPA, and is this a problem for competition law enforcement?" presented at the 7th annual competition commission, competition tribunal and Mandela Institute conference on competition law, economics and policy in South Africa (5 and 6-09-2013).

it is thus this risk of incarceration which poses the greatest threat to disclosure under the corporate leniency policy, because it will ultimately be the directors or managers of a firm that will decide whether to apply for leniency on behalf of such firm.¹⁶⁷ The lack of a proper operational structure and the lack of certainty that section 73A poses to a whistle-blower who has received immunity under the corporate leniency policy that its directors and managers who caused or acquiesced in its cartel participation will also receive immunity from criminal prosecution by the national prosecuting authority, or to a prospective leniency applicant who has the misfortune of not being first to the door with its leniency application of its directors and managers obtaining some form of lenient treatment outside the confines of the corporate leniency policy, may destroy the cartellists' appetite for self-reporting.

It may be asked whether it is really necessary to specifically criminalise the conduct of directors or managers of a firm who have caused the firm to engage in cartel activity or who have knowingly acquiesced in the firm's engaging in such cartel activity. In this regard Lopes, Seth and Gauntlett convincingly argue that the Competition Act

“maintains the characteristic of being a quasi-civil piece of legislation, intended to achieve broad socio-economic and redistributive policy objectives, rather than the individualised prosecution of criminal conduct which coincides with certain types of cartel conduct contemplated in the Competition Act”.¹⁶⁸

They correctly point out that directors and managers of firms who are involved in cartel activity are in any event at risk of being criminally prosecuted outside the confines of competition law for the general offence of corruption as expressed in the Prevention and Combatting of Corrupt Activities Act¹⁶⁹ as well as the common law crime of fraud.¹⁷⁰ They also point out that the current wording of section 49A of the Competition Act is in conflict with the introduction of the cartel offence as envisaged in section 73A, as section 49A provides that any self-incriminating answer provided by a person summonsed in terms of the said section to give evidence regarding cartel activity will not be able to be used against that person in criminal proceedings. Clearly the current format of the proposed section 73A also raises various constitutional issues, a discussion of which is beyond the limited scope of this contribution.¹⁷¹ That the current wording of section 73A as well as possibly section 49A of the Competition Act requires amendment to facilitate the effective introduction of the envisaged cartel offence behoves no argument.

Does this mean that the introduction of a cartel offence as envisaged by section 73A will not also benefit consumers? It is submitted that the answer is most likely that such express criminalisation may eventually tie in neatly with the Competition Act's consumer protection objectives. It has been pointed out that if a leniency programme is to be effective at uncovering and deterring cartels the competition authority needs effective sanctions for cartels.¹⁷² It is however questionable whether administrative fines, even though they may involve very large amounts, are on their

¹⁶⁷ Baker “The use of criminal law remedies to deter and punish cartels and bid-rigging” 2001 *George Washington LR* 693 705 reports being told by a “very senior corporate executive” that “as long as you are only talking about money, the company can at the end of the day take care of me ... but once you begin about taking away my liberty, there is nothing that the company can do for me”.

¹⁶⁸ Lopes, Seth and Gauntlett (n 166) 2.

¹⁶⁹ Act 12 of 2004. See Lopes, Seth and Gauntlett (n 166) 2.

¹⁷⁰ Lopes, Seth and Gauntlett (n 166) 3.

¹⁷¹ See Kelly (n 154) and Jordaan and Munyai (n 166) for a discussion of these constitutional issues.

¹⁷² See the ICN *Anti-cartel Enforcement Manual* (2009) (n 23). See further Bloom (n 34) 545.

own really an effective deterrent for cartel activity, as the possibility exists that large cartelists may merely discount these fines as part of their “operational costs” and filter them through to consumers by raising the prices of consumer goods and services.¹⁷³ Clearly, the same argument can be applied to criminal fines but not to imprisonment, which is a penalty that has to be borne personally. It should also be kept in mind that the criminalisation of cartel activity or certain aspects thereof and the imposition of criminal fines and incarceration of individuals are not new in the sphere of international competition law. The United States, being once again the leader in this arena, takes a “zero tolerance” approach to cartel activity.¹⁷⁴ Criminal liability for individuals and enterprises has been part of the American antitrust system from the beginning of its antitrust regime due to the fact that when congress made the Sherman Act in 1890, it made violations of sections 1 and 2 thereof misdemeanours punishable by fines and up to a year’s imprisonment.¹⁷⁵ Currently the maximum term of imprisonment in the United States for cartel participation is ten years.¹⁷⁶ In its third hard-core cartel report issued in 2005, the OECD recommended that governments in their fight against cartels should consider the introduction and imposition of criminal sanctions against individuals to enhance deterrence and incentives to cooperate through leniency programmes.¹⁷⁷ In Australia, where cartel activity has recently been criminalised, individuals face *inter alia* up to ten years in prison if found guilty.¹⁷⁸ Although cartel participation or conduct causing cartel participation has not been criminalised on the European Union level, a number of member states have already introduced criminal sanctions for cartel activity in their domestic competition legislation.¹⁷⁹

It is therefore submitted that the case for the introduction of specific criminal sanctions for causing a firm to engage in cartel conduct or knowingly acquiescing in the firm’s engagement in a cartel is not without merit. It is further submitted that the manner in which the South African legislature sought to introduce the cartel offence, namely by limiting it to directors and managers and not criminalising cartel participation by a firm *per se*, illustrates that the legislature comprehended that targeting the individuals who operate a firm and who fear the threat of imprisonment is far more valuable in the fight against cartels than prosecuting the firm, which can then pay a criminal fine and put the matter behind it, so to speak. Werden *et al* argue convincingly that the sanction of imprisonment for individuals enhances deterrence

¹⁷³ See also Kelly (n 154) 323, where he remarks that “the profitability of cartel operations in certain industries is so great that a simple cost benefit analysis, factoring in the likelihood of detection and punishment, potential legal fees and a possible fine of up to 10% of annual turnover, may be insufficient to deter those in control from embarking upon a process of cartelisation”.

¹⁷⁴ Baker (n 167) 693 indicates that the most distinctive aspect of United States antitrust enforcement is that those who engage in cartel activity are treated as serious criminals, with the result that individuals and co-conspirators are sent to jail on a regular basis.

¹⁷⁵ Sherman Act, ch 647, 26 Stat 209 (1890) (current version at 15 USC 1-3 (1994)). For a complete discussion of the development of criminal liability in respect of cartels see Baker (n 167) 694.

¹⁷⁶ Antitrust Procedures and Penalties Act PubL 93-528,s3,88,Stat 1706 1708 (1974). See also Masoudi “Cartel enforcement in the United States (and beyond)” speech presented at the Cartel Conference, Budapest Feb 2007 <http://www.justice.gov/atr/public/speeches/221868.htm> (22-02-2014).

¹⁷⁷ OECD Competition Committee “Hard-core cartels: third report on the implementation of the 1998 recommendation” (Dec 2005) www.oecd.org/competition (31-07-2013).

¹⁷⁸ Henrick and Henry “Australia: cartels” 2012 *The Asia-Pacific Antitrust Review* 1.

¹⁷⁹ See Hakopian “Criminalisation of EU competition law enforcement – a possibility after Lisbon?” 2010 *Competition Law Review* 159; MacCulloch “The cartel offence: defining an appropriate ‘moral space’” 2012 *European Competition Journal* 73.

of cartels.¹⁸⁰ They point out that the threat of a prison sentence provides individuals involved in cartel activity¹⁸¹ with the single greatest incentive to self-report through a leniency application and thereby escape sanctions.¹⁸² The authors argue that eliminating criminal liability for cartel participation would significantly undermine cartel deterrence in several distinct ways.¹⁸³ First, criminal liability in the form of imprisonment has a deterrent effect different to that of monetary sanctions, because a criminal conviction, apart from a deprivation of liberty, has a stigmatising effect. Second, the deterrent effect of monetary sanctions imposed through civil damages actions would be greatly diminished without assistance from criminal enforcement – this is because criminal enforcement against companies involved in cartels detects the cartels, establishes the liability of the defendants and provides valuable evidence for proving damages.

They indicate that even if criminal fines and damages are insufficient to make cartel activity unprofitable for any of the companies competing in a market, deterrence nevertheless can succeed if the threat of prison sentences prevents individuals within those companies from committing acts necessary to effectuate a cartel.¹⁸⁴ They further argue that the American Antitrust Division's leniency programme is effective because acceptance into the leniency programme can enable both companies and individuals to avoid substantial sanctions.¹⁸⁵ They submit that avoidance of corporate sanctions provides a strong incentive to come forward, because the likelihood of detection is substantial – companies participating in cartels are well aware that one of their co-conspirators or employees could apply for leniency and that the Antitrust Division has powerful criminal investigation tools.¹⁸⁶

The aforesaid arguments by Werden *et al* relating to the criminalisation of cartel activity (and by analogy, causing or knowingly acquiescing in cartel participation as envisaged by section 73A) operating effectively in tandem with the American leniency policy indicate that a situation is achievable where criminalisation of cartel activity (especially where the penalty is imprisonment) enhances the success rate of a leniency policy. Here however lies the rub: in America the department of justice has the authority both to grant amnesty and to prosecute. As Bloom aptly remarks on the ability of criminal sanctions to incentivise self-reporting under leniency programmes:¹⁸⁷ “But clearly, this incentive only applies where there is a criminal leniency program – and there is no risk that the discretion of a public prosecutor to pursue a case could undermine certainty for defendants that they will not be prosecuted if they apply for amnesty.”

The certainty of obtaining immunity or leniency if one meets a specified set of requirements is what essentially constitutes the lure of leniency, and it is submitted that it is this aspect that will eventually make or break an effective

¹⁸⁰ Werden *et al* (n 21) 7.

¹⁸¹ Clearly, a director or manager of a firm who causes the firm to engage in cartel participation or knowingly acquiesces in the firm engaging in a cartel can be said to be “involved in cartel activity”.

¹⁸² They remark that even when full immunity is no longer available, the threat of a prison sentence provides an incentive to an individual involved in cartel activity to cooperate with the prosecutor in exchange for a reduction in sentence.

¹⁸³ Werden *et al* (n 21) 9.

¹⁸⁴ Werden *et al* (n 21) 19. They point out that success in cartel deterrence might require only that one individual in one substantial competitor decline to commit the unlawful acts needed to effectuate the cartel.

¹⁸⁵ Werden *et al* (n 21) 15.

¹⁸⁶ Werden *et al* (n 21) 15.

¹⁸⁷ Bloom (n 34) 667.

leniency system. Thus, it is submitted that in order for the criminalisation of the act of causing or knowingly acquiescing in a firm's cartel activity as envisaged by section 73A, to augment the effectiveness of cartel enforcement in South Africa and to further incentivise applications for leniency under the corporate leniency policy it should ideally be provided that such immunity automatically translates into immunity for the cartelist firm from administrative fines as well as immunity from criminal prosecution for its directors, managers and also for other employees "masterminding" the cartel. The chasm to cross in this regard however represents itself in the divided enforcement jurisdiction of the competition commission and the national prosecuting authority respectively. That this is not an insurmountable problem is clear from the example of a country such as Australia, where a parallel regime of civil prohibitions and criminal offences for cartel conduct took effect on 24 July 2009.¹⁸⁸ The Australian competition and consumer commission (ACCC) is responsible for investigating cartel conduct, managing the leniency application process¹⁸⁹ and referring serious¹⁹⁰ cartel conduct to the Commonwealth Department of Public Prosecutions (CDPP), which is responsible for criminal prosecution of cartel offences.¹⁹¹ When the ACCC refers a case to the CDPP the ACCC will make a recommendation to the CDPP regarding immunity, or leniency (reduced penalties), in a criminal prosecution. The CDPP will take the ACCC'S recommendation into account, but it is obliged to make an independent decision on whether to prosecute or reduce fines, similar to the position envisaged by the proposed section 73A. The following aspects regarding the Australian regime are, however, noteworthy: the CDPP applies the same criteria in determining whether to grant immunity or leniency to individuals during a criminal prosecution for cartel conduct as the ACCC when considering immunity or leniency.¹⁹² In order to ensure that each institution carries out its functions effectively there is also a memorandum of understanding between the ACCC and CDDP.¹⁹³ It will be instructive from a South African perspective, given the similarity in the cartel offence provisions, to see how the bifurcated competition enforcement regime in Australia deals with the challenges of apportioning competition and criminal enforcement between two separate authorities and to take any lessons in this regard into account before amending and eventually implementing section 73A.

¹⁸⁸ Globalcompetitionreview.com/review/60/sections/.../australia (27-02-2014); see also Australia Competition and Consumer Act 2010 (Cth) (CCA) part iv. See also Beaton-Wells "Capturing the criminality of hard core cartels: the Australian proposal" 2007 *Melbourne University LR* 680; Samuel "Cartel enforcement in the spotlight – a major focus fort Australia and internationally" 2006 *Competition Law International* 3; Gray "Criminal sanctions for cartel behavior" 2008 *Queensland University of Technology Law and Justice J* 365.

¹⁸⁹ See the ACCC Immunity Policy for Cartel Conduct (July 2009) as well as the ACCC Immunity Policy Interpretation Guidelines and the ACCC Cooperation Policy for Enforcement Matters (<https://www.accc.gov.au/system/files/Immunity%20policy%20for%20cartel%20conduct%20and%20inter.pdf>) (27-02-2014).

¹⁹⁰ Henry and Huett *The Asia-Pacific Antitrust Review* (2014) ch 3 indicate that serious cartel conduct is cartel conduct that can cause large-scale or serious economic harm. For the factors that the ACCC will consider in this regard see the ACCC Immunity Policy Guidelines (n 189).

¹⁹¹ Henry and Huett (n 190) ch 3. The Australian cartel offence is broader than the cartel offence in the proposed s 73A, as it criminalises cartel conduct and not merely the act of causing participation in a cartel.

¹⁹² Henry and Huett (n 190) ch 3.

¹⁹³ ACCC and DPP Memorandum of Understanding (www.cdpp.gov.au/.../MR-20081201-ACCC-and-DPP-Cartel-Conduct-Immunity-MOU.pdf) (27-02-2014).

5 *Concluding remarks*

It is trite that cartel activity is detrimental to other competitors in the market who are not part of the cartel and to the consumer as end-user of the product to which the cartel activity relates. However, the mere prohibition of cartel activity and the threat of administrative fines are not on their own sufficient to curb cartel activities, as cartel members are generally not inclined to disclose their clandestine activities. Granting primary competition enforcement authorities the competence to adopt special policies to assist them in combating clandestine cartel activity is a common and necessary feature of competition enforcement regimes in developed jurisdictions. To this effect the enforcement tool provided by the corporate leniency policy, the validity of which has been acknowledged by the supreme court of appeal, in assisting the detection and prosecution of cartel activity is invaluable and in line with international trends in developed competition law jurisdictions. The delay in the implementation of the codification of the corporate leniency policy appears to be the result of such codification effort being hamstrung by its intended interaction with section 73A, the latter section being plagued by various difficulties which are prohibitive to its implementation. It is however submitted that the interaction between the corporate leniency policy and the proposed section 73A should be revisited, as it would be prudent to put the codification of the corporate leniency policy into effect, regardless of whether section 73A eventually comes into operation albeit in a changed format. In this regard the wording of the “codification” provisions in the 2009 Competition Amendment Act would probably require amendment to sever any interdependence between such codification and section 73A that would prevent putting the said codification into effect.

It is further submitted that the introduction of criminal sanctions such as imprisonment for causing a firm to engage in a cartel, or knowingly acquiescing in the firm’s engagement in such cartel participation, or even extending the scope of such offence to include other forms of participation in a cartel, ought to complement rather than compromise a leniency programme in the sense that the leniency programme should serve as facilitator for receipt of evidence on cartels and a measure which increases the possibility of their detection and aids deterrence, whereas the threat of incarceration in particular should act as incentive to self-report in an attempt to obtain leniency. This tandem benefit can in our opinion best be achieved if the effect of a successful leniency application is to absolve the firm participating in a cartel from administrative fines as well as to guarantee immunity from criminal fines and imprisonment for its directors and managers (and also other employees, where relevant) who caused it to engage in the cartel or knowingly acquiesced in such cartel participation. There should also be certainty of lenient treatment by the national prosecuting authority of the directors or managers of a cartel member, who although not “first to the door” with an application under the corporate leniency policy, are able to provide valuable information and evidence on the cartel. The current format and content of section 73A and the challenging divide between the authorities responsible for competition law enforcement and criminal law enforcement need to be reconsidered, however, and guidelines aligning their cooperation and providing clarity on the scope and extent of the national prosecuting authority’s discretion to grant immunity from criminal prosecution ought to be drafted in order to facilitate the effective introduction of the cartel offence into South African law.

SAMEVATTING**UITDAGINGS WAT DIE TOEGEEFLIKHEIDSBELEID IN DIE SUID-AFRIKAANSE MEDEDINGINGSREG IN DIE GESIG STAAR**

Die voorkoming, opsporing en vervolging van kartelle is 'n prioriteit van mededingingsowerhede wêreldwyd gegewe die negatiewe impak wat sodanige bedrywighede het op pryse en keuse van produkte en die feit dat dit invoering in markte smoor. Weens die groot geheimhouding waarin kartelbedrywighede gehul is, is dit egter uit 'n afdwingingsoogpunt uiters moeilik om voldoende inligting te bekom op grond waarvan kartelle aan die kaak gestel kan word.

Die Wet op Mededinging 89 van 1998 bevat in artikel 4(1)(b) bepalings wat karteldeelname aan prysvasstelling, markverdeling en samespannende tenders verbied. Voor die inwerkingtreding van gemelde wet het Amerika, synde die bakermat van statutêre mededingingsreg, besef dat die verordening van wetgewing alleen nie genoeg is om kartelle die stryd aan te sê nie en dat daar bykomende maatreëls ter afdwinging nodig is ten einde die mededingingsowerhede in staat te stel om inligting oor kartelbedrywighede te bekom. Met hierdie doel voor oë is die konsep van 'n toegeeflikheidsbeleid in die Amerikaanse mededingingsreg ingelei en het dit gou guns gewen in die Europese Unie en ander mededingingsjurisdiksies wat ook sodanige toegeeflikheidsprogramme aangeneem het.

In 2004 het die Suid-Afrikaanse mededingingskommissie die internasionale neiging gevolg en 'n toegeeflikheidsbeleid aangeneem, wat in 2008 hersien en verbeter is. Die geldigheid van hierdie beleid is egter onlangs bevraagteken in *Agri Wire (Pty) Ltd v The Commissioner of the Competition Commission*, welke saak uiteindelik voor die hoogste hof van appèl gedraai het. Die doel van hierdie bespreking is om die bestaansrede vir toegeeflikheidsprogramme in die mededingingsreg te ondersoek, aan te dui presies wat die omvang van die Suid-Afrikaanse mededingingskommissie se toegeeflikheidsbeleid is en aanslae teen die beleid te bespreek.